SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 884

ALASKA PACIFIC CONSOLIDATED MINING COMPANY, A CORPORATION,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

DEWITT WILLIAMS,
Counsel for Petitioner,
918 Joseph Vance Bldg.,
Seattle 1, Washington.

Of Counsel:
JAMES R. GATES,
V. A. MONTGOMERY,
ROBERT G. MOCH.

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CITATIONS

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To the Honorable the Supreme Court of the United States:

The Alaska Pacific Consolidated Mining Company, Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit entered in the above case on December 19, 1945.

Opinions Below

The findings of fact and the conclusions of law entered by the District Court appear at R. 34. The decision of the District Court (R. 26) was rendered April 21, 1944 and is reported at 56 F. Supp. 698. The decision sought to be

reviewed was rendered by the Circuit Court of Appeals for the Ninth Circuit in the Matter of L. Metcalfe Walling, etc., appellant, *v.* Alaska Pacific Consolidated Mining Company, respondent, on December 19, 1945, and appears at R. 434 (10 Labor Cases, sec. 62,896).

Jurisdiction

This Court has jurisdiction to review said decision under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347(a)).

Statute Involved

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., Sec. 201) are as follows:

> "Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (3) For a work week longer than 40 hours after the expiration of the second year from such date,
>
> "Unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Statement

The facts are adequately set forth in the findings of fact and conclusions of law entered by the District Court (R. 34-42) and are not disputed. They may be summarized as follows:

Petitioner is a Washington corporation engaged in the mining and milling of gold. Its mine is situated in the Talkteena Mountains, seventy miles from Anchorage,

Alaska. There is no town at the mine and the men are housed and boarded in company quarters. No men are available other than those on the company's payroll.

Petitioner's production employees may be classified into two groups: those working under an incentive bonus plan and those working under a so-called 6-2 plan, hereinafter explained, which were its Mill and Mine employees. This petition for a writ of certiorari is limited solely to the validity of this 6-2 plan as applied to employees admittedly within the Act.

Prior to the effective date of the Act, petitioner employed its Mill and Mine employees 7 eight-hour days per week and (once a month on the fifth of the month following completion of the work) paid each man a certain agreed wage per day. Prior to the effective date of the Act, petitioner was paying its employees the highest compensation in the area for comparable work and it continued to do so during the time here involved. However, already paying the highest wages in the area it did not desire to increase its labor outlay. Therefore, in order to adjust its wage plan to the Act, the company, prior to the effective date of the Act, by agreement with its Mill and Mine employees adopted the plan referred to in the Circuit Court's opinion as the 6-2 plan. This plan provided that the first six hours of each of the seven days in the calendar week were to be the regular non-overtime work week for the two years immediately following the effective date of the Act (R. 61). When the 40-hour statutory non-overtime work week became effective, the first six hours of the first six days and the first four hours of the seventh day of each week were designated in the contract as constituting the regular non-overtime work-week (R. 101). (The principle being the same, the statutory non-overtime work-week will hereafter be considered to be 40 hours though for a part of the time here involved it actually was more.) A regular contract per hour rate

was agreed upon for each class of employees for such non-overtime hours (R. 61). Thereafter, the company entered into similar employment agreements with all new employees (R. 67).

The men were given the privilege of working at least an additional 2 hours overtime each day at an overtime rate of one and one-half times the regular rate. All of the men in the mill and mine then working, except two or three, applied for and did work such additional overtime hours (R. 63). Petitioner at all times material paid its employees on the basis of these contracts, furnishing each employee at the time of payment with a statement showing the number of regular hours and the number of overtime hours for which he was being compensated (R. 72).

These wage agreements were entered into after negotiations between the company and its employees (R. 81-83) and were found by the District Court to have been entered into and carried out in good faith by both parties.

An analysis of the 1941 payroll (the year immediately preceding the commencement of this action) shows that 72.97 percent of the work-weeks worked by the employees under the so-called 6-2 plan consisted of 7 eight hour (or more) days for a work-week of 56 hours or more [1] (Plaintiff's Exh. No. 3, R. 61).

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[1] Analysis of 1941 payroll:

Full work-weeks of 56 hours or more	5,746	72.97%
Short work-week:		
Due to beginning or ending of employment during week	515	6.54%
Due to shift changes	388	4.93%
Due to holidays	221	2.81%
Due to illness and other causes	1,004	12.75%
Totals	2,128	27.03%
Grand Totals	7,874	100.00%

Briefly stated the matter here involved is the validity of such a plan operated in accordance with the above facts.

Questions Presented

Whether the Fair Labor Standards Act permits employer and employee by contract to designate the first six hours of each of the first six days and the first four hours of the seventh day of a week (40 in all) as the regular hours to which an agreed regular rate shall be applied with all hours in excess thereof to be paid for at one and one-half times such agreed regular rate, when the number of such regular hours are regularly scheduled and regularly worked each week by the employees involved; or

Whether, when the majority of the work days are for eight hours, the Fair Labor Standards Act requires that the first 40 hours constitute the statutory non-overtime work-week and the regular rate for purposes of Section 7 must be determined by dividing the total wage actually paid during the week by the hours worked, even though by contract the parties have designated the first six hours of the first six days and the first four hours of the seventh day of each week to be the regularly scheduled work-day to be paid for at an agreed rate per hour, with all hours in excess thereof to be paid for at one and one-half times such rate.

Reasons for Granting the Writ

The Circuit Court decision, which petitioner is herewith requesting be reviewed, in effect held that despite the contract agreed upon by employer and employees, the total compensation paid for the first forty hours worked per week must be considered the regular rate of pay for those hours and from this premise the Court decided that the regular rate referred to in the Fair Labor Standards Act must be calculated by dividing such total compensation by

40 or by dividing the total compensation received during the week by the hours worked in that week. (Either method will result in the same figure.) It so held despite the fact that the employer and employees involved had contracted that the first six hours of the first six days of the week and the first four hours of the seventh day of each week were to constitute the regularly scheduled work-week to be paid for at an agreed rate (admittedly above the minimum established by the Act, R. 36), with one and one-half times that rate to be paid for all hours worked in excess thereof and the employees regularly worked such a work-week and were actually compensated on such a basis. The Circuit Court thus:

(1) Rendered a decision in conflict with decisions of other Circuit Courts on similar matters.

Murray v. *Noblesville Milling Co.*, C. C. A. 7, 1942, 131 F. (2d) 470, cert. denied 318 U. S. 775, 63 S. Ct. 832, 87 L. Ed. 1145;

White v. *Witwer Grocer Co.*, C. C. A. 8, 1942, 132 F. (2d) 108;

General Mills, Inc., v. *Williams*, C. C. A. 6, 1942, 132 F. (2d) 367;

Bergschneider v. *Peabody Coal Co.*, C. C. A. 7, 1944, 142 Fed. 784.

(2) Decided an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States as more fully hereafter appears.

(3) Decided a federal question in a way in conflict with applicable decisions of the Supreme Court of the United States,

Walling v. *A. H. Belo Corp.*, 1942, 316 U. S. 624, 62 S. Ct. 1223, 86 L. Ed. 1716;

Williams v. *Jacksonville Terminal Co.*, 1942, 315 U. S. 386, 62 S. Ct. 659, 86 L. Ed. 914,

and as a result of a misinterpretation of *Walling* v. *Helmerich and Payne, Inc.*, 1944, 323 U. S. 37, 65 S. Ct. 11, 89 L. Ed. 1.

The Fair Labor Standards Act has not limited the freedom of employer and employees to contract concerning the hours of work and the rate to be paid therefor providing the provisions of said Act are not violated. *Walling* v. *Belo, supra.* The only requirement of that Act which is here material is Sec. 7(a) previously set out. The Circuit Court was of the opinion that this requirement of the Act was violated by the contract here involved, relying almost entirely on *Walling* v. *Helmerich and Payne, Inc., supra,* saying that in that case "the Supreme Court had declared a 'split day' plan *virtually identical* to the one under consideration here * * * to be a violation of Sec. 7 of the Act" (underscoring added). It is right here, at the base of the Circuit Court's decision, that petitioner takes issue with that opinion. The plan here involved is not at all identical with that involved in the *Helmerich* case. The difference is that between evasion and an honest, serious, bona fide effort to conform to the requirements of the Fair Labor Standards Act without penalizing employees with loss of compensation in any situation and without penalizing the employer with additional labor costs which were already the highest in the area.

> "To my mind the evidence at the trial unquestionably established that the defendant from the first day the Act became effective in 1939 and continuing to the trial was endeavoring to comply with the Act."
>
> *Walling* v. *Alaska Pacific Consolidated Mining Co.*, 56 F. Supp. 698.

It was imperative that the mine and mill be kept in continuous operation seven days a week and the employees were anxious to work 56 hours per week (R. 35, 36). Already

paying the highest wages of any similar mine and mill in the area, the company, of course, did not desire to grant an increase in total wages paid when the Act went into effect. In order to prevent this, the company could have revised its regular rate paid prior to the Act and considered that the first 40 hours worked each week constituted the non-overtime work-week, so that the resulting total compensation for a 56-hour work-week would be the same after the Act went into effect as it was before. This would have been legal and would have complied with the requirements of the Fair Labor Standards Act.

> "• • • Nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act."
>
> *Walling* v. *Belo, supra.*

See also:

Murray v. *Noblesville Milling Co., supra;*
White v. *Witwer Grocer Co., supra;*
General Mills, Inc., v. *Williams, supra;*
Bergschneider v. *Peabody Coal Co., supra.*

However, most of petitioner's employees missed a day of work now and then and such a plan would have penalized such employees.[2] This injustice is readily seen from the following example:

Prior to Act

56 hours worked per week at $8 per day = $1.00 per hour.

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[2] Because of the working site's isolation, an employee who needed even minor medical service (cut finger treated, tooth pulled) had to travel 60 to 70 miles to receive it. The primary purpose of the 6-2 plan was to prevent such an employee from losing all his overtime compensation when required to lose two days, where a city employee would have lost only about two hours.

If one day missed: 48 hours worked at $1.00 per hour, or $8 per day = $48.

After Act

56 hours worked per week at $.875 per hour, with time and one-half for hours over 40 = $56 per week.

If one day missed: 48 hours worked at $.875 per hour, with time and one-half for hours over 40 = $45.50.

Therefore, in order not to penalize such men, the 6-2 plan was devised:

Under 6-2 Plan

56 hours worked per week at $.875 per hour with time and one-half for overtime as per plan = $56 per week.

If one day missed: 48 hours worked at $.875 per hour, with time and one-half for overtime as per plan = $48.12.

Certainly this is a laudable purpose, and in no way contra to the intent of the Fair Labor Standards Act.

In the *Helmerich* case the parties never even contemplated that the standard set up by the Act, a 40-hour work week in excess of which overtime would be paid, would ever be effective. It is submitted that this Court held the split-day plan in that case invalid, not because a regular rate was established for hours less than the normally worked eight nor because daily overtime was paid, but because that split-day plan did not provide for and fix a regular rate for a regularly scheduled and regularly worked non-overtime work week of statutory duration, i. e., 40 hours, and an overtime rate of at least one and one-half times such regular rate for all hours in excess thereof.

"• • • Respondent's plan made no effort to base the regular rate upon the wages actually received or upon the hours actually and regularly spent each

week in working * * *" *Walling* v. *Helmerich and Payne, Inc., supra,* 89 L. Ed. at P. 4.

The contract in the instant case, on the contrary, is not fictitious or illusory; it is "not a mere artifice unrelated to wage-earning actuality". (Mr. Justice Frankfurter concurring in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 1945, 324 U. S. ——, 89 L. Ed. 1213 at P. 1221.) In the regularly scheduled non-overtime work week provided for by the contract here involved there would be 40 hours paid for at an agreed regular rate and that regularly scheduled non-overtime work week was normally worked. See Note 1, Page 5. It is submitted that, therefore, the provisions of the Fair Labor Standards Act were complied with, and the contract between the parties should be given effect.

The plan here under discussion is not affected by piece-rate cases, such as *Walling* v. *Youngerman-Reynolds Hardwood Co., supra,* and *Walling* v. *Harnischfeger Corp.*, 1945, 324 U. S. ——, 89 L. Ed. 1213. The Circuit Court did not rely upon them as far as that portion of its decision, concerning which petitioner now requests a review, is concerned. The Circuit Court only said that the *Youngerman-Reynolds* case strengthened its conclusion. In the piece-rate cases, there are, as a matter of fact, rates of compensation (the piece-rates themselves) applicable to all hours worked which have no relation to the regular rates supposedly agreed upon by the parties. In such instances, those rates clearly should be included in the amount which represents "the regular rate at which" an employee is employed, and an attempt to use such piece rates as a guarantee is nothing more than an attempted evasion. The present case is in no way comparable. Here there is a regular rate agreed upon for certain specified hours. In a regular normal work week, those hours amount to 40, the number set by statute. One and one-half times that rate

is agreed upon for all other hours worked, as provided by statute. Payments are *actually* so made. It is submitted that there is no need to further discuss piece-rate cases, except to point out that the following quotations therefrom substantiate petitioner's position:

> "• • • the regular rate refers to the hourly rate actually paid the employee for the normal, non-overtime work week for which he is employed." *Walling* v. *Youngerman-Reynolds Hardwood Co., supra,* P. 1217.

> "The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the work week, exclusive of overtime payments." *Walling* v. *Youngerman-Reynolds Hardwood Co., supra,* P. 1217.

Clearly, a regular rate of pay can be the subject of a valid contract between an employer and his employees, providing it is above the statutory minimum. *Walling* v. *Belo, supra.* It is submitted that what hours shall constitute the non-overtime work week can likewise be the subject of a valid contract between an employer and his employees. An employer and his employees are free to establish this period as they please, providing no provision of the Fair Labor Standards Act is violated. *Williams* v. *Jacksonville Terminal Co., supra,* 86 L. Ed. at P. 930, and principles set forth in *Walling* v. *Belo, supra.* We submit that the Act does not specify which 40 hours shall constitute the non-overtime hours. In fact, Sec. 7 (b) of the Act specifically provides for daily overtime and, when daily overtime is paid which also constitutes weekly overtime, of necessity the daily non-overtime hours must constitute the statutory non-overtime work week. However, the effect of the Circuit Court's decision in the case at bar is that the Act does require the first 40 hours regularly worked to be the non-overtime work week, even though all per day in excess of

6 are, by agreement, overtime hours. Such a determination is not mandatory, as will be more fully explained later, and, since it is not, the establishment of the non-overtime work week is within the province of the parties involved and not the Circuit Court. Admittedly, such a contract cannot so manipulate those hours as to nullify the standard set by the Fair Labor Standards Act, i. e., one and one-half times the regular rate must be paid each employee for hours worked over 40 per week. However, such a standard is not nullified when the contract established a regular rate for a regularly scheduled 40-hour work week which is regularly worked. Such is the instant case.

This must be true, because otherwise the Public Contracts Act, 49 Stat. 2036, 41 U. S. C., Sec. 35, as amended by Act of June 28, 1940, and by Act of May 13, 1942, hereinafter referred to as the Walsh-Healey Act, is in conflict with the Fair Labor Standards Act, and this obviously is not so. Under the provisions of the Walsh-Healey Act, and regulations of the Secretary of Labor, issued in accordance therewith (official regulation 504 under the Walsh-Healey Public Contracts Act, Series A, issued by the Secretary of Labor Sept. 14, 1936 (1 FR 1405) as amended), one and one-half times the regular rate of pay must be paid for all applicable work over 8 hours per day, as well as over 40 per week. It is submitted that the present plan is nothing more or less than the plan set up by this Act and regulations issued thereunder. Many employers and employees coming within that Act operated under a regularly scheduled 10-hour day during the past 4 years, and thus were under an 8-2 plan. Under such an 8-2 plan, an agreed regular rate was valid and effective. *Walling* v. *Patton-Tulley Transportation Co.*, 1943, 134 F. (2d) 945. The Administrator of that Act, who is likewise the Administrator under the Fair Labor Standards Act and the respondent herein, has never contended and a court has never held to the con-

trary. It is submitted that no one has ever seriously argued that under such an 8-2 plan the regular rate should be determined by dividing the total compensation for the first 40 hours worked by 40, or by dividing the total compensation received in a week by the hours worked in that week. It should not be any more seriously argued that the regular rate should be so calculated under the 6-2 plan, and the Circuit Court erred in so holding. If one and one-half times the regular rate of pay must be paid for work over 8 hours per day under the Walsh-Healey Act, even though the regularly scheduled work week may be 10 hours, no reason is apparent why an agreement that overtime shall be paid for hours worked per day over 6 shall not be given like effect. Of course, as previously stated, the regularly scheduled non-overtime hours must be 40, should the hours worked exceed 40; otherwise there is an evasion of Sec. 7 of the Fair Labor Standards Act. True, the 8-hour daily standard is established by legislative and administrative action, and the 6-hour daily standard by contract. However, the 6-hour standard is certainly as humane as the 8; the reason for the 6-hour standard is certainly laudable—prevention of loss of pay to an employee who is absent during a work week; in the absence of prohibition by or conflict with constitution or statutes, a contract should be valid and should be given effect, and, as long as 40 non-overtime hours are regularly scheduled and regularly worked, no conflict with the Fair Labor Standards Act arises in connection with the 6-2 plan. It is also true that a 4-4 split day plan has been held invalid, *Walling* v. *Helmerich & Payne*, *supra*, and petitioner believes correctly so. Hence, the problem is: Where should the line be drawn? It is submitted that the line is one between fiction and fact, between evasion and compliance, between an agreed non-overtime work week of the statutory duration, regularly scheduled and regularly worked, with a regular contract rate therefor,

and no such regularly scheduled and regularly worked non-overtime work week.

The 8-2 plan allows the agreed regular rate to be effective, and still conforms to both the Walsh-Healey Act and the Fair Labor Standards Act, when the days regularly scheduled in a week amount to five 10-hour days, because then the regularly scheduled non-overtime hours amount to 40. If the days regularly scheduled in a work week amount to four and one-half 10-hour days only, it may be that the Fair Labor Standards Act requires the total compensation received during the week to be divided by the hours worked to determine the regular rate, because there is no non-overtime work week of statutory duration. If the Fair Labor Standards Act does not so modify the Walsh-Healey Act, then the 6-2 plan is similarly not modified, regardless of the number of non-overtime hours of work regularly scheduled each week. Irrespective of such a conclusion, however, the 6-2 plan conforms to the Fair Labor Standards Act provisions just as much as does the 8-2 plan, when an 8-hour day is regularly scheduled as regards the former plan and a 10-hour day is regularly scheduled as regards to the latter. The latter is obviously valid; therefore, the former must be. Also, the 4-4 split day plan would be valid too, if the regularly scheduled and regularly worked non-overtime work week was 40 hours. The vice of the 4-4 plan in the *Helmerich* case was that no such work week existed. In the instant case, it does. The cleavage between validity and non-validity is as simple as that.

The Circuit Court of Appeals for the Ninth Circuit ignored this fundamental difference between the instant case and the *Helmerich* case, condemning a *bona fide* attempt to conform to the Fair Labor Standards Act on the ground that such attempt is governed by a decision involving an obvious attempt to evade the Act and from which it is

clearly distinguishable. No citations are needed to show that such an opinion is contra to applicable decisions of this Court, since it refuses to distinguish right from wrong.

The question here is of great importance. It involves the limitation of the freedom of contract. In the instant case, where clearly the parties attempted to conform to the Fair Labor Standards Act, this freedom has been abridged by reliance upon a case where clearly an attempt was made to evade the Act. It is submitted that this Court should take this opportunity to reiterate that the parties to an employment contract are free to agree on the elements thereof providing the Fair Labor Standards Act does not prohibit the resulting agreement.

Petitioner has above endeavored to show that the contract here involved does not violate the Act. Its contentions should be heard. Otherwise a decision of this Court, *Walling* v. *Helmerich and Payne, Inc., supra,* will have been used, and probably will be used again and again, to cast doubt upon a provision of a statute duly passed by Congress, the Walsh-Healey Act, by invalidating a plan no different from an 8-2 plan as far as the applicable statute is concerned.

Furthermore, the Circuit Court's decision is based upon the proposition that daily overtime cannot be paid for hours normally worked during a day; and, if one and one-half times an agreed regular rate is paid for any hours normally worked, the statutory regular rate is not that agreed upon but is the total compensation received for such a day divided by the hours therein worked. Such a theory means that the regular rate can only be determined retroactively since the normal work day can be ascertained only by a study of hours actually worked. This, in effect, entirely eliminates the freedom or right of the parties to set a regular rate with daily overtime, because any increase in hours

regularly worked will, under the Circuit Court's decision, make applicable a statutory regular rate not contemplated by the parties. Thus, if the Circuit Court's decision is allowed to stand, an employer regularly operating 8 hours per day, five days a week, at agreed regular rates, plus time and one-half for hours worked in excess of 8 per day, cannot operate for 10 hours per day for any substantial length of time without subjecting himself not only to time and one-half for the additional hours but to a raise in the regular rate, which, in turn, will be reflected in the overtime rate. Such negation of the right of contract was not intended by the Act.

Also, the same decision will have been used, and probably will be used again and again, to cast doubt upon, and even to invalidate, a proposition often advocated by the representatives of employees: the reduction of the work day. For example: it may well be that in collective bargaining, the representatives of the employees involved will advocate a seven-hour day, the work week to consist of five days of seven hours each and one day of five hours, a total of 40. The employer may be willing to agree to such a work week, providing his present production does not drop. It may be that he believes as much can be produced under such a plan as under an eight-hour day for five days and four hours on the sixth, but also believes it necessary to be in a position to regularly run his establishment eight hours per day if necessary, paying one and one-half times the agreed regular rate for the extra hours. Likewise, an employer may be willing to agree to such a plan while still intending to regularly operate his plant eight hours per day and the employees may be willing to agree to such a plan as an opening wedge for a day in which there will be only seven hours of work. In fact, such a plan was actually put into effect and its legality adjudicated in *Robertson* v. *Alaska Juneau Gold Mining Co.*, 1945, 61 F. Supp. 265.

The learned judge in that case held a 7-1 plan valid, expressing the opinion that *Walling* v. *Helmerich and Payne, Inc., supra,* was not applicable, saying that the contract regular rate before him "was not fictitious or illusory." See also:

> "The six-hour day at the regular rate and two overtime hours each day, as agreed to between the defendant and its employees in force upon the effective date of the Act and prior to the institution of the action, was not such a fantastic or unnatural arrangement as to deprive the defendant and its employees from contracting therefor. In fact, in the building trades in this locality for some considerable period, the six-hour day was the regular established day" (R. 40).

Practically, however, such a plan can never be put into effect as long as the Circuit Court's decision in this case is allowed to stand because a regular rate of pay cannot be agreed upon. Regardless of what the parties to the employment contract agree shall be the regular rate of pay, the Circuit Court's decision precludes it from being effective.

It is submitted that such far-reaching effects, including the imposition of a definite limitation upon what many consider to be progress, should not be placed upon the labor relations field without consideration thereof by the Supreme Court of the United States. This is especially so when it will be so placed by a decision misinterpreting a decision of this Court (*Walling* v. *Helmerich and Payne, Inc., supra*), conflicting with applicable decisions of this Court (*Walling* v. *Belo, supra; Williams* v. *Jacksonville Terminal Co., supra*) and conflicting in principle with decisions of other Circuit Courts of Appeal.

Murray v. *Noblesville Milling Co., supra;*
White v. *Witwer Grocer Co., supra;*
General Mills, Inc. v. *Williams, supra;*
Bergschneider v. *Peabody Coal Co., supra.*

Conclusion

It is respectfully submitted that this petition for certiorari should be granted.

DeWitt Williams,
Counsel for Petitioner,
918 Vance Building,
Seattle 1, Washington.

Of Counsel:
James R. Gates,
V. A. Montgomery,
Robert G. Moch.

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